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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 506

NEW YORK SHIPPING ASSOCIATION, INC., AMERICAN STEVEDORES, INC., BAY RIDGE OPERATING COMPANY, INC., HELLENIC LINES LTD., MARRA BROS., INC., JOHN W. McGRATH CORPORATION, NORTHEAST STEVEDORING CO., NORTHEAST MARINE TERMINAL CO., INC., INTERNATIONAL TERMINAL OPERATING CO., INC., DANIELS & KENNEDY, INC., PITTSTON STEVEDORING CORP., UNIVERSAL TERMINAL & STEVEDORING CORP., ALEXANDER CHOPIN, W. A. CRAIG, D. H. McKAY, R. W. NEITZ, F. L. RESPAUT, D. J. SCHMIDT, and J. B. YOUNG, *Petitioners*,

v.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION (AFL-CIO), RAYMOND McKAY, President, SHORESIDE SUPERVISORS UNION, DISTRICT 2, MEBA (AFL-CIO), ROSARIO CICCONE, Executive Director, and SALVATORE DANTONE, JACK GIORDANO, THOMAS COSTA, PETER THOMASINO, FRANK DANTONE, DANIEL POTHIN, JOHN GARAMANTI, LEONARD NOVA and RALPH HANNEN, on behalf of themselves and all others similarly situated, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners pray that a writ of certiorari issue to review the memorandum and order of the Court of Appeals of the State of New York, entered in the above case on June 14, 1968.

OPINIONS AND ORDERS BELOW

The order of the Supreme Court of New York (Kings County) at Special Term (R. 7-10) was entered on November 2, 1967, and was accompanied by an opinion which is reported at —— M. 2d ——, —— N.Y.S. 2d ——, appears at pages 138-140 of the record below, and is printed as Appendix B hereto. This order dismissed respondents' complaint, ordered a trial on petitioners' counterclaim for damages, and enjoined, *pendente lite,* respondents from picketing.

The order of the Appellate Division of the Supreme Court of New York, Second Department, which unanimously affirmed the order of the Supreme Court of New York, was entered on January 17, 1968, and was accompanied by an opinion which is reported at 29 A.D. 2d 139, 287 N.Y.S. 2d 799, appears at pages 145-152 of the record below, and is printed as Appendix C hereto.

The order of the Court of Appeals of the State of New York, which modified the orders below, was entered on June 14, 1968, and was accompanied by a memorandum opinion which is reported at —— N.Y. 2d ——, —— N.E. 2d ——, —— N.Y.S. 2d ——, and is printed in Appendix D hereto. This order, in which all judges of the Court of Appeals concurred except Judge Scilleppi, who dissented and voted to affirm, denied petitioners' cross-motion for a temporary injunction against picketing by respondents and, as so modified, affirmed the orders below.[1]

---

[1] On August 19, 1968, Mr. Justice Harlan denied petitioners' application for a stay, but did so on the basis of a draft of our petition for a writ of certiorari which was incomplete and in substantial respects different from the final petition presented here.

JURISDICTION

The order of the New York Court of Appeals modifying the orders below of the Appellate Division and of the New York Supreme Court was entered June 14, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

At every stage of these proceedings, petitioners have relied upon §§ 2(3) and 14(a) of the Labor Management Relations Act of 1947; have asserted that the substantive law applicable to this case is set forth in that Act, in the decision of this Court in *Hanna Mining Co.* v. *District 2, MEBA,* 382 U.S. 181 (1965), and in the reports of congressional committees interpreting said Act, and have argued that the picketing here was enjoinable by a state court because it represented illegal economic compulsion proscribed by federal law and in contravention of federal labor policy.[2] All three New York courts that have passed upon this case have relied upon and have purported to interpret federal law.

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[2] Memorandum in Support of Defendant-Employers' Motion for Injunctive Relief, Supreme Court of New York, Kings County (Special Term, Part I, pp. 4-9); Memorandum of Respondent, New York Shipping Association, Inc., et al. in Opposition to Appellants' Application and Motion for a Stay Pending Appeal, Appellate Division of the Supreme Court of New York, Second Department (pp. 5-7); Supplemental Memorandum of Defendants-Respondents, New York Shipping Association, Inc., et al. in Opposition to Plaintiffs-Appellants' Appeal, Appellate Division, Supreme Court of New York, Second Department (pp. 7-16); Brief of Respondent, New York Shipping Association, Inc., et al., Court of Appeals, State of New York (pp. 9-19).

STATUTES INVOLVED

The statutory provisions involved are §§ 2(3) and 14(a) of the Labor Management Relations Act of 1947 (61 Stat. 137, 151; 29 U.S.C. §§ 152(3), 164(a) (1964)), and New York Labor Law, Art. 22-A, § 807. They are printed in Appendix A, *infra*.

QUESTIONS PRESENTED

1. Whether the New York Court of Appeals, ignoring all federal law and authority and disregarding the national labor policy, can misinterpret the Labor Management Relations Act of 1947 and that national policy by permitting a union of supervisors (who are the indisputable agents of management and owe their allegiance exclusively to management) to picket management to compel recognition for collective bargaining purposes.

2. Whether Congress by § 14(a) of the Act did more than merely deprive supervisors of the administrative remedies of the Wagner Act, a deprivation already effected by § 2(3) of the Act, and whether, in fact, Congress' "propelling intention" in § 14(a) as described by this Court in *Hanna Mining Co.* v. *District 2, MEBA* was not to deprive supervisors of any power of compulsion.

3. Whether § 14(a) of the Act, in its use of the clause

> * * * but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

comprehends within the ambit of "any law" not only compulsion effected through processes of federal and state agencies but also compulsion effected through any state law, whether statutory or decisional.

4. Whether New York Labor Law, Art. 22-A, § 807, is void as repugnant to paramount federal labor law insofar as it forces employers to treat supervisors as rank-and-file employees for purposes of collective bargaining.

STATEMENT

Petitioners are steamship and stevedoring companies in the Greater New York area, including New Jersey; their collective bargaining representative, the New York Shipping Association, Inc. (NYSA); the International Longshoremen's Association, AFL-CIO (ILA), and various officers of these companies and organizations. Respondents are District 2, Marine Engineers Beneficial Association, AFL-CIO (MEBA), the Shoreside Supervisors Union (SSU), and certain of their officers. MEBA is a labor organization representing only supervisory employees in the maritime industry (R. 35), and SSU is a labor union chartered by MEBA to organize supervisory employees in that industry.

The dispute in this case arose during the summer of 1967, when MEBA and SSU approached the petitioner employers and sought recognition for SSU as the collective bargaining representative of the employers' supervisory personnel (pier superintendents and hiring agents) working in Brooklyn alone. These pier supervisors and hiring agents are not "working men" or "rank and file employees" in any sense of the word,

nor have the respondent unions claimed that they were (see R. 15). They earn from $10,000 to $30,000 a year, they are in charge of entire piers and terminals, and they regularly hire, on behalf of management, hundreds of longshoremen and checkers.

SSU threatened to picket if its demands were not met. SSU had no strength in any other part of the Port of New York, and it depended for its success on the affirmative support of one of the locals of longshoremen in that Port, namely, Local 1814 of ILA. This support was not long in coming. Local 1814 strongly supported and encouraged SSU, contrary to the instructions of its parent international (R. 43). The President of Local 1814, after noting that SSU was planning to strike against various employers doing business on the Brooklyn waterfront, reported the adoption of a resolution:

> That Local 1814 give complete support in [SSU's] action to gain representation for the members of that union. [R. 101.]

The President of Local 1814, moreover, actively participated in presenting SSU's representation demands and threatened the employers with the consequences of refusal (R. 44, 101).

Petitioner employers refused to recognize the respondent unions as the bargaining agents of their supervisory personnel. Thereupon, on October 19, 1967, the respondents picketed every pier in Brooklyn.

When SSU struck, approximately 250 pier superintendents and hiring agents left their jobs. This fact alone did not stop the respondent employers' operations in Brooklyn. The Brooklyn longshoremen-members of Local 1814, however, refused to cross the SSU

picket lines. This prevented the loading and unloading of cargo and brought the operations of these employers in Brooklyn to a complete halt.

On the same day, October 19, the joint NYSA-ILA Labor Relations Committee issued a determination and order holding that the work stoppage engaged in by Local 1814 was in violation of the labor contract between NYSA and ILA and directing the Local 1814 longshoremen back to work. This direction was ignored.

Thus, with the active, widespread and powerful cooperation of the rank and file employees—in direct violation of a "no-strike" agreement—the SSU strike was an unqualified success.

The impact of the strike—even though it continued in effect only fifteen days before being enjoined by the courts—was catastrophic.

—It immobilized 40 ships.

—One-third of the Port of New York was completely shut down.

—Over 10,000 employees of shipping companies, stevedores, freight forwarders, consignees and other businesses were laid off.

—Millions of dollars worth of Christmas merchandise was spoiled or irretrievably delayed en route.

—The aggregate cost *per day* to the shipping industry in the Port in terms of lost business, cargo, deprivations, etc., exceeded $3,000,000.

The restricted area of the strike is pertinent. For more than 60 years, steamship and stevedore employers have dealt with unions on a single portwide basis,

covering not only Brooklyn but Manhattan, Staten Island, Hoboken, Newark, Jersey City, Bayonne and Elizabeth. The NLRB certification of the ILA covers all waterfront employees "in the Port of Greater New York and vicinity * * * ". *New York Shipping Association, Inc.*, 116 N.L.R.B. 1183, 1188 (1956).

The very ILA Local supporting SSU in this action and in the strike which brought about this action, Local 1814, unsuccessfully sought a bargaining unit in 1956 different from that certified by the NLRB.

Brooklyn is only a part of the overall port-wide unit. Of the 22,000 longshoremen and 1,000 pier superintendents and hiring agents throughout "the Port of Greater New York and vicinity", only about 8,000 longshoremen and about 250 pier superintendents and hiring agents usually work in Brooklyn (R. 30, 36). Many Brooklyn longshoremen and supervisory employees work for their employers in other locations in the Port as well.

Four days after the strike began, SSU and MEBA filed a complaint against petitioners in the New York Supreme Court, Kings County, at Special Term. It alleged two causes of action in "conspiracy", the first a "conspiracy" among petitioners to "destroy" SSU and MEBA; the second a "conspiracy" to prevent respondents "from exercising their constitutional rights to belong to a labor union of their own choosing" (R. 19). SSU and MEBA also moved to enjoin petitioners from carrying out their "conspiracy".

Petitioners joined issue, counterclaimed for damages and sought a permanent injunction against the picketing. Petitioners also cross-moved for a temporary injunction against the picketing and for dismissal of the complaint for insufficiency (R. 125-137).

The New York Supreme Court granted both of petitioners' motions by order entered November 2, 1967 (R. 7-10, App. B). The Appellate Division of the Supreme Court of New York, Second Department, unanimously affirmed that order by its order entered January 17, 1968 (R. 143-144, App. C). In its order of June 14, 1968, the Court of Appeals of the State of New York in effect unanimously affirmed the lower courts' dismissal of the complaint for insufficiency and their denial of respondents' motion for an injunction. By a divided court, however, that order also dissolved the injunction against the SSU picketing (App. D).

Respondents expressly and repeatedly conceded below three important facts:

(1) The pier superintendents and hiring agents they were trying to represent are supervisory and therefore are not deemed "employees" under the Act (R. 15).

(2) Respondents sought to organize only the supervisors employed by the petitioner employers in Brooklyn, although for many decades the appropriate bargaining unit of the maritime industry has always encompassed the entire metropolitan New York area ("the Port of Greater New York and vicinity"), and most of the employers involved have places of business throughout the metropolitan New York area (R. 14, 22, 23).

(3) Employers have the full legal right not only to refuse to bargain with unions claiming to represent supervisory employees but to go even further and fire such supervisory employees (Respondents' Main Brief, Court of Appeals, State of New York, pp. 11-24).

REASONS FOR GRANTING THE WRIT

I

The decision of the New York Court of Appeals gives a revolutionary and erroneous interpretation of §§ 2(3) and 14(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §§ 152(3), 164(a), and is in direct conflict with paramount federal law. In holding that a union purporting to represent supervisors may picket to compel recognition for collective bargaining purposes, that decision contravenes national labor policy, the intent of Congress and the opinion of this Court in *Hanna Mining Co.* v. *District 2, MEBA, supra.*

At the heart of this case is the meaning to be given to §§ 2(3) and 14(a) of the Act, which read in pertinent part as follows:

> [§ 2(3):] The term "employee" shall include any employee * * * but shall not include * * * any individual employed as a supervisor.
>
> [§ 14(a):] Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act *shall be compelled* to deem individuals defined herein as supervisors as employees *for the purpose of any law, either national or local, relating to collective bargaining.* [Emphasis supplied.]

That these sections of the Act express a national labor policy enforceable in the States is not open to doubt.

> * * * It can readily be seen what mischief might be wrought if, for example, foremen should be subject to State law at the same time that the workers they supervise are subject to national law.

> Moreover, the bill herewith reported *very definitely states a national policy in respect of organization and collective bargaining by foremen.* [H. R. Rep. No. 245, 80th Cong., 1st Sess. 40 (1947); emphasis supplied.]

What is that national policy? What did Congress intend?

Very simply, that policy and intent are that since supervisors are "a part of management" and must be "wholly loyal to management," employers must be free from any compulsion by supervisory unionism to compel recognition. The very idea of legal or economic compulsion is alien to the obvious need and desirability of supervisors' undivided loyalty to management. As Senator Taft, the chief sponsor of the Act, stated in explaining § 14(a):

> It is felt very strongly by management that foremen are part of management; that it is impossible to manage a plant unless the foremen are wholly loyal to the management. We tried various in-between steps, but the general conclusion was that they must either be a part of management or a part of the employees. It was proposed that there be separate foremen's unions not affiliated with the men's unions, but it was found that that was almost impossible; that there was always an affiliation of some sort; that foremen, in order to be successful in a strike, must have the support of the empolyees' union. * * * The tie-up with the employees is inevitable. [93 Cong. Rec. 3836 (1947).]

Throughout the House Report on the Act, there is emphasis upon the necessity and importance of supervisors being faithful agents of management, failing which, "instead of their bossing the rank and file, the

rank and file bosses them" (H.R. Rep. No. 245, 80th Cong. 1st Sess. 14 (1947)). "[T]he complete disruption of discipline and productivity in the factories of the United States" would result (93 Cong. Rec. 3836 (1947) (remarks of Senator Taft).

The case at bar illustrates the very vices aimed at by Congress in § 14(a). Respondents' supervisory picketing would have been completely ineffectual if the picket lines had not been recognized by the thousands of rank-and-file employees over whom the picketing supervisors had charge. Here, pier superintendents and hiring agents formed their alliances with the Brooklyn longshoremen in violation of their duties and their loyalty to management.

In *Hanna,* the same respondent as involved here, MEBA, already represented supervisory personnel and was seeking to negotiate a new contract.[3] When the employers refused to negotiate, MEBA began picketing and, just as in the instant case, longshoremen joined the supervisory personnel in refusing to cross the picket lines. When the NLRB specifically declined to intervene because supervisors fall outside §§ 7 and 8 of the Act, the employers filed suit in the Wisconsin state courts. An important difference between *Hanna* and this case is that in *Hanna* the state courts wanted to issue an injunction against the picketing but thought they were precluded from doing so by the Federal Act. The only issue presented in *Hanna* was whether the

[3] The right of MEBA and SSU to negotiate in the instant case is even more tenuous than in *Hanna,* because here petitioners' supervisory employees have never before been represented by MEBA, SSU or any other union. Moreover, in *Hanna,* unlike here, the entire area under dispute was picketed rather than a select portion of it.

NLRB had exclusive jurisdiction over the dispute and whether the state was thus precluded from entering its injunction. Although there was no issue as to whether the state *had* to issue an injunction in order to conform to federal law, the Court's language in deciding *Hanna* is nevertheless extremely pertinent to the issues here.

The Court first pointed out that § 7 no longer bestows on supervisory empolyees the right to engage in concerted activities under the umbrella of § 8, and therefore any activity designed to secure organization or recognition of supervisors cannot be protected by § 7 (382 U.S. at 188).

MEBA argued that the Act evidenced a federal policy of *laissez faire* toward supervisors, so that the state as well as the NLRB was without authority to act. At the same time, MEBA argued that the state injunction would prohibit supervisors from joining unions, which was a right expressly reserved to them by Congress.

This Court disagreed with both contentions. It said:

> This broad argument fails utterly in light of the legislative history, for the Committee reports reveal that Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees. [382 U.S. at 189; footnote deleted.]
>
> * * *
>
> However, even assuming that § 14(a) itself intended also to make it clear that state law could not prohibit supervisors from joining unions, the section would have no application to the present facts; for picketing by a minority union to extract recognition by force of such pressures is

> decidedly not a *sine qua non* of collective bargaining, as indeed its limitation by § 8(b)(7) in non-supervisor situations attests. [382 U.S. at 190.]

In other words, this Court sharply differentiated between the right to join a union and the right of a union to compel recognition by compulsion. That is precisely the differentiation which the New York Court of Appeals failed to make in this case.

The fact is that if the compulsion used by respondents in this case remains unchecked, the entire congressional purpose of placing supervisors outside the protection of §§ 7 and 8 will have been thwarted and emasculated. As pointed out above, the only point of making these sections inapplicable to supervisors was to maintain supervisors as part of management. Yet the direct result of the decision below would be to *force* management to recognize a union of supervisors on a level with its rank-and-file employees. While supervisors in Wisconsin are prohibited from engaging in such compulsion, supervisors in New York would have the approving and protective stamp of the law placed upon the same compulsion.

The New York Court of Appeals in this case adopted the very *laissez faire* viewpoint which this Court rejected in *Hanna*. The New York court held:

> Section 14(a) of the Labor Management Relations Act prevents supervisors' unions from claiming the benefit of statutes requiring employers to bargain collectively but does not limit their right to engage in otherwise lawful picketing, (*A.H. Bull Steamship Co.* v. *National Marine Eng. B. Ass'n.*, 250 F. 2d 332, 339, cert. den., 355 U.S. 932; see *Hanna Mining Co.* v. *Marine Engineers*, 382 U.S. 181, 189). [App. D.]

This statement is twice wrong.

It is not § 14(a) which "prevents supervisors from claiming the benefits of statutes requiring employers to bargain collectively * * * ". That deprivation was accomplished by § 2(3), which specifically excludes supervisors from the definition of "employees" protected by the Act. If such deprivation was the purpose of § 14(a), that section would be mere surplusage.

Section 14(a) had a different, an expressly stated, and a more extensive purpose. As this Court pointed out in *Hanna,* that purpose was to relieve employers from "compulsion". Thus, the second error of the decision below lies in its assertion that § 14(a) "does not limit [supervisors'] * * * right to engage in otherwise lawful picketing".

In addition to the concept of compulsion, § 14(a) deals in the most generic way possible with the concept of "law" when it uses the phrase, " * * * for the purpose of any law, either national or local, relating to collective bargaining". The section did not use the word, "Act", referring to the Labor Management Relations Act itself, although in the key clause of this very § 14(a), the word "Act" is used (" * * * but no employer subject to this Act * * * "). Obviously, therefore, the word "law" here means more than the Act or the judicial or administrative procedures comprehended by the Act or by equivalent state legislation.

Similarly, the word "law" includes more than other statutory enactments, administrative regulations and like classifications. Unquestionably "any law" in this context means any expression of the sovereign's power —whether in the form of statutory law, decisional law, common law, substantive law, adjectival law or admin-

istrative law. Thus, it matters not in what "law" or exercise of sovereign power the compulsion proscribed by § 14(a) originates. The prohibition is all-encompassing; no compulsion of any kind or created out of any "law" is permissible.

Petitioners submit that if a state legislature enacted a statute with the identical expression used by the New York Court of Appeals, namely, that supervisors have "a right to engage in * * * picketing" to compel recognition, that statute would be a "local law" "relating to collective bargaining", which the legislature would be expressly prohibited from enacting by § 14(a).

What the Legislature cannot do by statute, the Court of Appeals may not do by decision.

Ironically, although Congress intended that supervisors would *not* have the protection of §§ 7 and 8 of the Act so that they would remain part of management, the decision below gives supervisors rights which are far greater than those possessed by rank-and-file employees who *are* protected by these sections. For example, prohibitions in the Act against secondary boycotts would have no effect upon a supervisory union. Similarly, supervisors could arrogate to themselves any bargaining unit which they wish, and strike and picket for recognition of that unit. In this very case, respondents have argued that "any unit [which] supervisors can succeed with is, thus, in laymen's terms, appropriate * * *" (See Appellants' Reply Brief, Court of Appeals of the State of New York, p. 14). Surely Congress did not intend, by taking supervisors out from under the umbrella of the Act, to give them greater bargaining power, and greater license to act beyond any legal control, than the power and license enjoyed by rank-and-file employees.

There is nothing unique in the labor field about state courts having jurisdiction to enforce federal law. Thus, suits for violation of § 301(a) of the Labor Management Relations Act of 1947 may be brought in the state courts, which must then follow the national labor policy.[4] *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 514 (1962); *Smith* v. *Evening News Ass'n*, 371 U.S. 195 (1962); *Local 174* v. *Lucas Flour Co.*, 369 U.S. 95, 104 (1962). As this Court pointed out in *Courtney, supra*, 368 U.S. at 507, "* * * nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law." (In fact, some federal laws can be enforced *only* in the state courts. *Id.* at 508 n. 4.) Suits under § 301(a) have been held to lie in the state courts even when the NLRB arguably has

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[4] This body of law has been variously described as "Federal labor policy" (*Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 652 (1965)), "the national labor policy" (*Amalgamated Ass'n* v. *Wisconsin Board*, 340 U.S. 383, 397-398 n.23 (1951)), "national labor policy" (*John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 549 (1964); *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 308 (1964); *Local No. 438* v. *Curry*, 371 U.S. 542, 550 (1963); *Smith* v. *Evening News Ass'n*, 371 U.S. 195, 198 n.6 (1962)), "federal common law" (*Wheeldin* v. *Wheeler*, 373 U.S. 647, 651-652 (1963)), "federal common law in this area of labor management relations" (*Charles Dowd Box Co.* v. *Courtney, supra*, 368 U.S. at 507), "the policy of our national labor laws" (*Local 174* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962)), "national labor policies" (*Vaca* v. *Sipes, supra*, 386 U.S. at 180), "the scheme of federal labor laws" (*Vaca* v. *Sipes, supra, id.* at 188), and the "uniform body of federal substantive law" (*Smith* v. *Evening News Ass'n, supra*, 371 U.S. at 200). Perhaps the most recent treatment of "the national labor policy" has been in *United Industrial Workers* v. *Board of Trustees of Galveston Wharves*, 5th Cir., No. 25081, August 8, 1968, pp. 28, 33 of slip opinion. Regardless of how labeled, this policy is clearly an amalgam of substantive federal law and is enforceable in the state courts.

jurisdiction over the conduct complained of (*Smith* v. *Evening News Ass'n, supra,* 371 U.S. at 197, and *Vaca* v. *Sipes, supra*), as well as when the Board is wholly without jurisdiction (*Charles Dowd Box Co.* v. *Courtney, supra,* 368 U.S. at 513).

The situation in the instant case is quite analogous to that in *Local 174* v. *Lucas Flour Co., supra,* 369 U.S. 95, where an employer fired an employee, the union struck, and the employer sued in a state court. This Court held that § 301(a) did not deprive the state court of jurisdiction but that federal law applied. Noting that the subject matter was "peculiarly one that calls for uniform law" (369 U.S. at 103), this Court held that "incompatible doctrines of local law must give way to principles of federal labor law."[5] The Court added: "State law which frustrates the effort of Congress to stimulate the smooth functioning of that process [promoting industrial peace] thus strikes at the very core of federal labor policy."[6]

Thus, it is important that the Court review the decision below not only because of the extremely serious economic results that will flow from another work stoppage—at least $3,000,000 a day, judged by the

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[5] 369 U.S. at 102, quoted with approval in *International Union* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 701 (1966). This doctrine is hardly unique. In other cases the Court has said that "• • • there are enclaves of federal judge-made law which bind the states." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 426 (1964). "State law may be utilized so far as it is of aid in the development of correct principles of their application in a particular case • • •, but the law which ultimately results is federal." *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 548 (1964).

[6] 369 U.S. at 104, quoted with approval in *International Union* v. *Hoosier Cardinal Corp., supra,* 383 U.S. at 702.

prior strike—but because the entire fabric of the national labor policy will be disrupted and fragmented if the New York view prevails.

The decision below casts a cloud over the clear meaning of *Hanna,* puts in serious doubt the capacity of state courts to enjoin supervisory picketing,[7] and virtually invites conflicting results in the various states on a matter of concern to all employees and employers. Perhaps most importantly, the view below directly thwarts the congressional will, for it casts the supervisors' lot with that of the rank-and-file employee.

II

The New York statute upon which the highest court of New York relied is in conflict with paramount federal law insofar as it applies to supervisors.

As this Court pointed out in *Hanna,* the intent of Congress in enacting § 14(a) was to relieve employers of any pressure under local law to bargain collectively with supervisors as if they were employees.

New York Labor Law, Art. 22-A, § 807, prohibits New York State courts from issuing an injunction in any case arising out of a labor dispute:

> 1. No court nor any judge or judges thereof shall have jurisdiction to issue any restraining order or a temporary or permanent injunction in any case involving or growing out of a labor dispute, as hereinafter defined * * *.

Section 807 goes on to define a labor dispute as follows:

> 10 (c). The term "labor dispute" includes any controversy concerning terms or conditions of em-

[7] See, *e.g., Safeway Stores* v. *Retail Clerks International Ass'n,* 41 Cal. 2d 567, 261 P.2d 721 (1953).

> ployment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, or *any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee.* [Emphasis added.]

These words thus define a labor dispute to include any controversy involving the interests of employees or employers, whether or not the disputants actually stand in that relationship.

The New York Court of Appeals has held that MEBA is protected by § 807 and that the court cannot enjoin a strike by MEBA intended to force petitioners to bargain collectively with them. This interpretation of § 807 puts it in direct conflict with § 14(a). Section 14(a) relieves employers of compulsion under state law to deal with supervisors as they do with rank-and-file employees. Section 807 as applied by the Court of Appeals bestows upon supervisors the protection afforded rank-and-file employees in labor disputes. Under this application, New York employers must now treat supervisors as rank-and-file employees for the purposes of § 807, a local law. Clearly the two laws—state and federal—canot be reconciled.

Since this Court cannot resolve the conflict by putting a different gloss on § 807, it should hold that the federal law embodied in § 14(a) controls, and reverse the decision of the New York Court of Appeals.

CONCLUSION

Picketing by supervisors to compel recognition for collective bargaining purposes violates the spirit, intent and express prohibition of § 14(a). If all that section was intended to accomplish was the denial to supervisors of Wagner Act remedies, then the section is surplusage.

Unless the compulsion proscribed by § 14(a) is given the broad effect which Congress intended, a Pandora's Box of labor problems will be opened heralding a significant future period of industrial strife. At the very least, there will be forum-shopping by unions and employers—*e.g.*, New York versus Wisconsin—in regional or national disputes, despite the necessity for a "uniform application" of substantive rules and the need "to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies * * *."[8]

The decision of the New York Court of Appeals should be reversed.

Respectfully submitted,

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[8] *Garner* v. *Teamsters Union*, 346 U.S. 485, 490-91 (1953), quoted with approval in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 242-43 (1959).

APPENDIX A

1. Labor Management Relations Act, 1947, Title I, § 2(3), §14(a):

Section 2(3). The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined. [61 Stat., 137 (1947), 29 U.S.C., § 152(3) (1964)]

Section 14(a). Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining. [61 Stat., 151 (1947), 29 U.S.C., § 164(a) (1964)]

2. New York Labor Law, Article 22-A, § 807:

1. No court nor any judge or judges thereof shall have jurisdiction to issue any restraining order or a temporary or permanent injunction in any case involving or growing out of a labor dispute, as hereinafter defined * * *.

* * *

10(c). The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee.

APPENDIX B

(Opinion of the Supreme Court of the State of New York (Kings County) at Special Term)

OPINION OF DI GIOVANNA, J.

The action herein is for a permanent injunction and damages allegedly caused by the defendants' conduct and conspiracy to intentionally inflict harm on plaintiff unions and to deprive their members of the rights to organize into a union of their own choosing. Plaintiffs move for a temporary injunction. All defendants cross-move to dismiss the complaint on the ground that it fails to state a cause of action and the defendant, New York Shipping Association, Inc., additionally cross-moves for a temporary injunction prohibiting the plaintiffs from picketing in or near the terminals operated by the defendant in Kings County or at any other place in the Port of New York.

The Shore Side Supervisors Union (hereinfter "SSU") alleges that it was granted in September 1966 a charter by plaintiff District 2, Marine Engineers Beneficial Association (hereinafter "District 2") to organize shore side supervisory personnel employed by steamship and stevedoring companies in the shipping, maritime and longshore industries and, since that time, with the assistance of District 2, has been engaged in organizing in the Port

of New York such shore side supervisors as hiring agents, assistant pier superintendents and pier superintendents; that by August 1967, it had among its members the majority of the above mentioned supervisors working in the Port of Brooklyn and who designated SSU as their representative for collective bargaining with their employer; that about that time the defendants entered into a conspiracy to destroy SSU as a trade union, to injure thereby District 2 and to prevent the members from exercising their rights to organize into a trade union; that in pursuance of said conspiracy, defendant Chopin, the chairman of the defendant New York Shipping Association (hereinafter "NYSA"), and others presently unknown to plaintiff, agreed that they would arbitrarily refuse to have any discussions with SSU concerning their employees who have chosen SSU as their collective bargaining agent; that when said actions precipitated SSU to resort to a strike, defendant Gleason, the president of International Longshoremen's Association (hereinafter "ILA"), and others unknown to plaintiff, agreed to use the membership of ILA to breach the strike and to prevent SSU from realizing its right to represent its membership.

It is additionally alleged that in furtherance of the conspiracy, (1) defendant "Brooklyn stevedores" failed to appear at a meeting called by SSU for the purpose of exhibiting proof that it represented the majority of the Brooklyn supervisory employees; (2) Brooklyn stevedores rejected the offer to SSU to prove its majority representation; (3) when advised that SSU was authorized by the members to strike Brooklyn Stevedores, the latter replied that they did not want their supervisors to be represented by a union; (4) when SSU struck the defendants, NYSA and ILA called a special meeting of the Labor Relations Committee (hereinafter "LRC") which was established under their collective bargaining agreement. This was done for the purpose of having their representatives find that the honoring of the SSU picket line by members

of the ILA was a violation of the contract between NYSA and ILA; (5) that LRC did find that the honoring of the picket line by ILA members was a violation of the contract and that thereafter ILA ordered its members to break the strike; (6) Brooklyn stevedores attempted to enforce the decision of LRC by means of an injunction.

Plaintiffs assert that by reason of the foregoing, they have suffered irreparable damage and injury through the continued threat to break the picket line and have monetarily suffered damage to the extent of one million dollars.

The basis for an action in conspiracy is the commission of a tortious act or a legal one by wrongful means (*Cuker Industries Inc.* v. *Cro Construction Co.*, 6 App. Div. 2d 415). Plaintiffs fail to show the violation of any legal duty owed by the defendants to the plaintiffs. The law does not confer upon plaintiffs any right to representation status. Plaintiffs, being the representatives of a group of supervisors, are denied access to the procedures of federal and state law, which alone can confer legally enforceable representation rights upon any labor organization. Thus, the employers are legally privileged to refuse to bargain with the supervisors or any of their representatives (*260 Madison Ave. Corp.* v. *Nelson*, 284 App. Div. 254; *A. H. Bull Steamship Co.* v. *National Maritime Engineers' Beneficial Association AFL-CIO*, 250 F. 2d 332). And the mere opposition of one union to the formation of another union is not an act which the law will prohibit. The law recognizes the right of every union to strengthen its forces by lawful means. If other unions arise which may in some manner act to the detriment of an existing union, the court will not impede the efforts of the existing union from protecting itself by prohibiting it from peacefully counseling others not to recognize the newcomer. Under these principles the court finds that the complaint fails to spell out the commission of any wrong against the plaintiffs and accordingly the motion by the plaintiffs for a preliminary injunction is denied and the complaint is dismissed.

In passing it should be noted that upon argument of the motion plaintiffs asked the court to also consider the action herein as one for a prima facie tort. Under any theory, no wrong is set forth in the complaint but, even assuming arguendo that the facts are sufficient to set forth a prima facie tort, the complaint would be insufficient in its failure to allege special damages. (*Glaser* v. *Kaplan,* 5 A. D. 2d 829, 830.)

The cross motion of NYSA for a preliminary injunction is granted in all respects. The picketing by the plaintiffs does not encourage a lawful labor objective and there is no labor dispute within the meaning of Section 807 of the Labor Law (*260 Madison Avenue Corp.* v. *Nelson,* 284 App. Div. 254, *supra*). The trial of the counterclaim for a permanent injunction and damages is set down for November 8, 1967 at 10 A.M. at Special Term, Part III of this court subject to the approval of the Justice presiding. Settle order on notice.

DI GIOVANNA,
J.S.C.

APPENDIX C

(Opinion of the Appellate Division of the Supreme Court of the State of New York, Second Department)

SUPREME COURT

APPELLATE DIVISION

SECOND JUDICIAL DEPARTMENT

BELDOCK, P. J., RABIN, HOPKINS, BENJAMIN and MUNDER, *JJ.*

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION (AFL-CIO). *et al.*,

Appellants,

against

NEW YORK SHIPPING ASSOCIATION, INC., *et al.*,

Respondents,

NORTHEAST STEVEDORING CO., INC., *et al.*,

Defendants.

Appeal from an order of the Supreme Court at Special Term (Anthony J. Di Giovanna, J.), entered November 2, 1967, in Kings County, which (1) granted two cross motions, each by a different group of defendants, for dismissal of the complaint; and (2) granted a further cross motion by one of such groups of defendants for a temporary injunction.

SCHULMAN, ABARBANEL & KRONER (HOWARD SCHULMAN and BERTRAM PERKEL, of counsel), for appellants.

LORENZ, FINN & GIARDINO (ALFRED GIARDINO, C. P. LAMBOS and JAMES F. COSGROVE, of counsel), for respondents New York Shipping Association, Inc., *et al.*

WALDMAN & WALDMAN (LOUIS WALDMAN, SEYMOUR M. WALDMAN and MARTIN MARKSON, of counsel) for respondent INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*

BELDOCK, *P. J.* The plaintiffs are (1) District 2, Marine Engineers Beneficial Association (AFL-CIO), (2) the Shoreside Supervisors Union, Dist. 2, MEBA (AFL-CIO) (hereinafter called "SSU") and (3) certain members of SSU. The individual plaintiffs sue for themselves and on behalf of all other members of SSU similarly situated. SSU is an "affiliate" of District 2, Marine Engineers Beneficial Association (AFL-CIO) and represents certain of the hiring foremen and pier superintendents ("supervisory personnel") working on the piers in Brooklyn.

The defendant International Longshoremen's Association, AFL-CIO (hereinafter called "ILA") is a labor union which represents the longshoremen and other dockside employees, other than supervisory personnel, employed in the Port of New York. Its president is Thomas W. Gleason, named as one of the defendants. The employers of the longshoremen and supervisory personnel are various domestic and foreign shipping lines and stevedoring contractors which are organized for collective bargaining purposes into the defendant New York Shipping Association, Inc. (hereinafter called "NYSA"). The chairman of NYSA, Alexander Chopin, is also named as a defendant. The remaining defendants are representatives of ILA and NYSA in the Labor Relations Committee (hereinafter called "LRC"), the grievance and arbitration tribunal created under the ILA-NYSA collective bargaining agreement.

The action is for (1) a permanent injunction against defendants' alleged conduct and conspiracy to intentionally inflict harm on the plaintiff unions and to deprive their members of their right to organize into a union of their own choosing and (2) money damages. Plaintiffs moved for an injunction *pendente lite*. All the defendants, except two of the employer defendants, cross-moved to dismiss the complaint on the ground that it failed to state a cause of action, and all the defendants other than the same two employer defendants and ILA, Gleason and Robert Con-

ners (the latter is the ILA representative in the LRC) additionally counterclaimed for an injunction and money damages and cross-moved for an injunction *pendente lite* prohibiting plaintiffs from picketing in or near the terminals operated by the employer defendants in Kings County or any other place in the Port of New York. Special Term granted the cross motions in all respects.

The complaint sets forth two causes of action, the first by the unions and the second by the members of SSU. The material allegations in the first cause of action have been fairly summarized by Special Term and require only a brief recital. In substance, it alleged that SSU had been chartered to organize shoreside supervisory personnel employed by steamship and stevedoring companies; that by August, 1967 it had among its members the majority of the supervisors working in Brooklyn (Kings County) who had designated SSU as their representative for collective bargaining with their employers; that about that time the defendants entered into a conspiracy to destroy SSU as a trade union and to prevent its members from exercising their right to organize into a trade union; that, in pursuance of said conspiracy, Chopin, NYSA. the employer defendants and others agreed that they would arbitrarily refuse to have any discussion with SSU concerning their employees; and that, when said actions caused SSU to resort to a strike, Gleason, ILA and others agreed to use the membership of ILA to break the strike. It is additionally alleged that in furtherance of the conspiracy the employer defendants failed to appear at a meeting called by SSU for the purpose of exhibiting proof that it represented the majority of the Brooklyn supervisory employees; that the employer defendants rejected the offer of SSU to prove its majority status; that, when SSU struck and established picket lines at all work sites of the employer defendants, NYSA and ILA callled a special meeting of LRC for the purpose of having their representatives find that the honoring of the SSU picket lines by members

of ILA was a violation of the contract between NYSA and ILA; that LRC did find that the honoring of the picket lines by ILA members was a violation of the contract; and that thereafter ILA ordered its members to break the strike.

In the second cause of action it is alleged, in addition to repeating the foregoing, that the defendants entered into the conspiracy for the additional purpose and object of depriving the members of SSU of their right to organize and belong to a union of their own choosing and that the individual plaintiffs and all others similarly situated have suffered and continue to suffer irreparable damage and injury.

Supervisory personnel occupy a unique and somewhat anomalous position in the field of labor-management relations. The National Labor Relations Act as amended by the Labor Management Relations Act, 1947 (Taft-Hartley Law) provides in subdivision (3) of section 2 that "The term 'employee' * * * shall not include * * * any individual employed as a supervisor" (U.S. Code, tit. 29, § 164, subd. [3]). Subdivision (a) of section 14 of the amended act (U. S. Code, tit. 29, § 164, subd. [a]) provides that any individual employed in a supervisory capacity may become a member of a labor union "but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining." Thus, under the Taft-Hartley Law, an employer is relieved of the duty to bargain with a union as the representative of supervisory personnel. As stated in *260 Madison Ave. Corp.* v. *Nelson* (284 App. Div. 254), "the Taft-Hartley Law provides that a supervisory employee may become a union member, if he so desires, but his employer may not be compelled to treat him as an employee for collective bargaining purposes regardless of any provision of national or local law."

Notwithstanding the seemingly clear expression of legislative policy and intent as enunciated in the Taft-Hartley

Law, the plaintiffs urge that the defendant employers have an affirmative duty to bargain collectively with the representative of their supervisory employees and that any interference with the exercise of the latters' right to bargain collectively gives rise to a remediable cause of action. Support for this argument is predicated upon Section 17 of Article I of the Constitution of the State of New York which provides: "Employees shall have the right to organize and to bargain collectively through representatives of their own choosing."

In our opinion, the plaintiffs' reliance on the provision of the Constitution hereinabove quoted is unavailing. It has been held that, while employees have the constitutional right to organize, it does not necessarily follow that all employers have the concomitant obligation to bargain collectively with them if they do organize (*Matter of Trustees of Columbia Univ.* v. *Herzog,* 269 App. Div. 24, affd. 295 N.Y. 605). "It is evident that the constitutional provision guaranteeing employees the right to organize and bargain collectively through representatives of their own choosing does not cast upon all employers a correlative obligation. The constitutional provision was shaped as a shield; the union seeks to use it as a sword" (*Quill* v. *Eisenhower,* 5 Misc. 2d 431, 433).

Subdivision (a) of section 14 of the Taft-Hartley Law provides that an employer may not be compelled to treat a supervisor as an employee for the purpose of any law, *national or local,* relating to collective bargaining. To construe section 17 of article I of the Constitution of the State of New York as guaranteeing to supervisory personnel the right to compel their employers to bargain collectively with their union, as suggested by the plaintiffs, would be contrary to and in derogation of the national policy as expressed in the Federal statute which, in effect, unclassifies supervisors as "employees" under Federal and State law, statutory or constitutional, regulating the exercise of employees' collective bargaining rights. As was said in

Hanna Mining v. *District 2, Marine Eng. Ben. Assn.* (382 U.S. 181; 189), "the Committee reports reveal that Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees."

Since Federal law expressly accords to employers the right to refuse to consider their supervisory personnel as employees for collective bargaining purposes, the allegations of the complaint which, in substance, merely charge the defendant employers with refusing to meet and negotiate with SSU do not form the basis of a legally enforceable cause of action. Nor does the employer's participation, through the LRC, in the grievance procedure established under the contract between NYSA and ILA constitute a basis for the relief herein sought. Clearly, these defendants had the right to invoke the grievance procedure for the purpose of protecting their interest which they believed were being prejudiced as the result of the refusal of ILA's members to cross the picket lines.

As to the remaining defendants, the gravamen of the cause of action against them is that they conspired to oppose the plaintiffs' efforts to obtain recognition as the bargaining representative of the supervisory personnel; that they directed ILA members not to support the strike; and that they participated in a grievance proceeding under the contract with NYSA to declare the refusal of its members to cross the picket lines a violation of the contract and to direct its members to cross the picket lines.

We are in accord with the views expressed by the court at Special Term that ILA's opposition to SSU's efforts to achieve recognition was in pursuance of a legitimate interest and that its conduct in so doing was legally permissible and non-actionable. There is no charge that ILA has attempted to interfere with SSU's efforts to recruit membership or has committed any acts directed against

that union's members (cf. *American Guild of Musical Artists* v. *Petrillo*, 286 N.Y. 226).

Disregarding, as we must, the allegations of the complaint which are clearly conclusions of law, we find no facts therein set forth which support the plaintiffs' claims for the relief which they seek and are of the opinion that the complaint was properly dismissed.

There is only left for consideration the question of whether the cross motion for an injunction *pendente lite* should have been granted. The plaintiffs maintain that they have a right to peacefully picket to make known their grievances; the defendants contend that the picketing, which sought to compel the defendant employers to recognize SSU as the bargaining agent for its members, was not for a lawful objective and, hence, enjoinable.

Section 807 of the Labor Law (formerly Civ. Prac. Act, § 876-a) does not bar injunctive relief in a case where no lawful labor objective is sought (*Goodwins* v. *Hagedorn*, 303 N.Y. 300, mot. for rearg. den. 303 N.Y. 673). At bar, the establishment and maintenance of the picket lines at the piers were intended solely for the purpose of "compelling" the defendant employers to recognize SSU as the bargaining agent for its supervisor members. In view of the fact that it is contrary to established national policy to compel employers to treat supervisors as employees for collective bargaining purposes, we find that, under such circumstances, it is an "unfair labor objective" for a union representing supervisors to attempt to achieve this result by the use of coercive economic pressure which seeks as its goal the very thing which the union is otherwise prohibited from accomplishing. Furthermore, the issuance of the injunction *pendente lite* did not constitute an infringement of the plaintiffs' right of free speech (cf. *International Broth. of Teamsters, Local 695, AFL* v. *Vogt*, 354 U.S. 284). Although peaceful picketing is recognized as an exercise of the right of free speech, it cannot be made the cover for con-

certed action against an employer in order to achieve an unlawful or prohibited object (cf. *Vogt* v. *International Broth. of Teamsters, Local 695, A.F.L.*, 270 Wis. 321a). We conclude that the issuance of the temporary injunction constituted an appropriate exercise of the court's jurisdiction.

The order should be affirmed, without costs. Rabin, Hopkins, Benjamin and Munder, J.J., concur.

APPENDIX D

(Opinion of the Court of Appeals of the State of New York)

DECISION COURT OF APPEALS—JUNE 14, 1968

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION (AFL-CIO), & ORS., &C., *Appellants*,

v.

NEW YORK SHIPPING ASSOCIATION, INC., & ORS., &C., *Respondents*.

Order modified by denying defendants' cross-motion for a temporary injunction against picketing by plaintiff union, and, as so modified, affirmed without costs, in the following memorandum:

The purpose of the picketing in question was not "unlawful", and section 807 of the Labor Law prevents issuance of an injunction. Section 14(a) of the Labor Management Relations Act prevents supervisors' unions from claiming the benefit of statutes requiring employers to bargain collectively but does not limit their right to engage in otherwise lawful picketing (*A. H. Bull Steamship Co.* v. *National Marine Eng. B. Ass'n*, 250 F.2d 332, 339, cert. den. 355 U.S. 932; see *Hanna Mining* v. *Marine Engineers*, 382 U.S. 181, 189). All concur except Scileppi and Keating, JJ., who dissent and vote to affirm on the ground that this is not a labor dispute under § 807 of the Labor Law and the picketing by the plaintiffs was not for a lawful labor objective.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 506

NEW YORK SHIPPING ASSOCIATION, INC., AMERICAN STEVEDORES, INC., BAY RIDGE OPERATING COMPANY, INC., HELLENIC LINES LTD., MARRA BROS., INC., JOHN W. McGRATH CORPORATION, NORTHEAST STEVEDORING CO., NORTHEAST MARINE TERMINAL CO., INC., INTERNATIONAL TERMINAL OPERATING CO., INC., DANIELS & KENNEDY, INC., PITTSTON STEVEDORING CORP., UNIVERSAL TERMINAL & STEVEDORING CORP., ALEXANDER CHOPIN, W. A. CRAIG, D. H. McKAY, R. W. NEITZ, F. L. RESPAUT, D. J. SCHMIDT, and J. B. YOUNG, *Petitioners.*

v.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION (AFL-CIO), RAYMOND McKAY, President SHORESIDE SUPERVISORS UNION, DISTRICT 2, MEBA (AFL-CIO), ROSARIO CICCONE, Executive Director, and SALVATORE DANTONE, JACK GIORDANO, THOMAS COSTA, PETER THOMASINO, FRANK DANTONE, DANIEL POTHIN, JOHN GARAMANTI, LEONARD NOVA and RALPH HANNEN, on behalf of themselves and all others similarly situated, *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

HOWARD SCHULMAN,
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Of Counsel:
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BERTRAM PERKEL

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 506

NEW YORK SHIPPING ASSOCIATION, INC., AMERICAN STEVEDORES, INC., BAY RIDGE OPERATING COMPANY, INC., HELLENIC LINES LTD., MARRA BROS., INC., JOHN W. McGRATH CORPORATION, NORTHEAST STEVEDORING CO., NORTHEAST MARINE TERMINAL CO., INC., INTERNATIONAL TERMINAL OPERATING CO., INC., DANIELS & KENNEDY, INC., PITTSTON STEVEDORING CORP., UNIVERSAL TERMINAL & STEVEDORING CORP., ALEXANDER CHOPIN, W. A. CRAIG, D. H. McKAY, R. W. NEITZ, F. L. RESPAUT, D. J. SCHMIDT, and J. B. YOUNG, *Petitioners*.

v.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION (AFL-CIO), RAYMOND McKAY, President SHORESIDE SUPERVISORS UNION, DISTRICT 2, MEBA (AFL-CIO), ROSARIO CICCONE, Executive Director, and SALVATORE DANTONE, JACK GIORDANO, THOMAS COSTA, PETER THOMASINO, FRANK DANTONE, DANIEL POTHIN, JOHN GARAMANTI, LEONARD NOVA and RALPH HANNEN, on behalf of themselves and all others similarly situated, *Respondents*.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Question Presented

1. Whether picketing by a majority union[1] of supervisory employees to gain collective bargaining with a cov-

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[1] Despite intimations to the contrary in the petition there is no issue in this case of stranger or minority unionism. At all times the respondent union represented a majority of those employees on whose behalf it sought recognition, namely the Brooklyn supervisors employed by the employers involved.

ered employer violates § 14(a) of the Labor-Management Relations Act of 1947 (61 Stat. 151; 29 U.S.C. § 164(a) (1964).[2]

Reasons for Denying the Writ

Supervisors employed in industries such as the maritime industry, the entertainment industry, the printing and building trades, all regulated by the Labor Management Relations Act of 1947, have engaged in collective bargaining for years—both prior to and subsequent to 1947. They have struck, picketed and engaged in all other types of union economic activity.

They have developed elaborate collective bargaining relationships incorporating many gains. In the decision attacked by this petition the New York Court of Appeals refused to write *finis* to those relationships. The Court refused to hold that the 1947 Amendments rendered *all* supervisor union economic activity unlawful in the face of statutory language withholding only the protection of federal and state labor relations laws from such activity.

The vast social consequences of the petitioners' argument, namely, the destruction of these collective bargaining relationships going back over half a century and involving tens of thousands of supervisory workers, would

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[2] § 14(a) provides:

> "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

be enough to give rise to some doubt about its soundness. A glance at the life history of the statutory provision upon which they rely suggests that their argument borders on the frivolous. In the twenty-one years since the passage of the amendments, revolutionary years in our labor law, not one court, State or Federal, has read the Act as the petitioners do. As a matter of fact every Court that has spoken on this issue, albeit tangentially, has read the Act in exactly the same way as the New York Court of Appeals.[8] Nothing on the face of the Act itself, the language of which is clear and unambiguous, or in its legislative history supports the petitioner's view. Nor is there one word of support anywhere in the academic commentary for the petitioners' view. Their position should get equally short shrift in this Court.

The statutory issue in this case is not complicated at all. It is whether economic activity, picketing, striking or other forms of activity designed to gain collective bargaining is the compulsion "for the purposes of any law, either national or local, relating to collective bargaining," barred by § 14(a). Petitioners urged unsuccessfully be-

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[8] We exclude, of course, the lower court decisions reversed by the Court of Appeals in this case. No other Court has held squarely on the issue in this case—itself a telling fact. Petitioners' augury of doom if the Court of Appeals holding stands is pallid against the twenty-one years of collective bargaining in which no employer has ever litigated the precise issue. *Cf.* Safeway Stores, Inc. v. Retail Clerks Int'l Ass'n, 234 P. 2d 678, 20 C.C.H. Labor Cases, ¶66,522, p. 80,084 (Cal. Dist. Ct. App., 1st Dist. 1951) ("It is equally clear that the Congress by this enactment [of 14(a)] did not place any restriction on the common law or non statutory rights of supervisors to organize for the purpose of bargaining with their employers and to use any of the recognized legal methods of pressure (striking, picketing, etc.). . . ."

low, and now urge this Court, to amend Section 14(a) to excise "for the purpose of any law . . . relating to collective bargaining," and substitute "for any purpose relating to collective bargaining." In short petitioner wishes to have this Court rewrite the Act so as to deprive supervisors of the right to use any economic pressure at all in the course of collective bargaining.

Now the plain language of the Act itself does not permit this interpretation. It says that the Act bars compulsion of employers *"for the purpose of any law . . . relating to collective bargaining."* A "law relating to collective bargaining" is a law such as the Act itself, the Railway Labor Act, or a state labor relations act. That this was what was meant is clear from the explanation given by the Senate Committee that drafted it:

> "The bill does not prevent anyone from organizing nor does it prohibit any employer from recognizing a union of foremen. It merely relieves employers who are subject to the national act free *from* any *compulsion by this National Board or any local agency to accord to the front line of management the anomalous status of employees.* S. Rep. No. 105, 80th Cong. 1st Sess., p. 5. See also, H.R. Rep. No. 245, 80th Cong., 1st Sess., pp. 13-17" (Emphasis supplied)

In other words neither the NLRB nor any state labor board can make it an unfair labor practice for an employer covered by the Act to refuse to bargain with a supervisors' union That is all the provision does; it does not reach trade union activity in any other way.

Since petitioners rely on this Court's decision in *Hanna Mining Co.* v. *District 2, MEBA,* 382 U.S. 181 (1965) it is pertinent to point out that the very language quoted above is reproduced as footnote 12 to this Court's language in

Hanna that is quoted at p. 13 of petitioner's brief as follows (curiously enough without the footnote!):

> "This broad argument (referring to MEBA's argument in *Hanna* that Sec. 14(a) preempted state action in the field) fails utterly in the light of the legislative history, for the Committee reports reveal that Congress' propelling intention was to relieve employers from any compulsion *under the Act and under state law* to countenance or bargain with any union of supervisory employees. 12." (Emphasis added.)

The illuminating legislative gloss on Sec. 14(a) that furnished the foundation for this Court's view in *Hanna* that Section 14(a) only relieved "employers from any compulsion under the Act and under state law"—not from all compulsion whatever the source, makes clear that Congress' intent was only to deprive supervisors' economic pressure of its prior status as "protected" activity, not to outlaw it.

Senator Taft reiterated the view of his bill appearing in the Senate Report, *supra,* when he spoke on the floor in favor of overriding the Truman veto:

> "The bill provides that foremen shall not be considered employees under the National Labor Relations Act. They may form unions if they please, or join unions, *but they do not have the protection of the National Labor Relations Act. They . . . are generally restored to the basis which they enjoyed before the passage of the Wagner Act.*" 1 Leg. Hist. at 1008. (Emphasis added.)

Senator Claude Pepper, at the time a friend of labor, and also not one to understate the negative implications of this bill to which he was vigorously opposed, summed up Congress' understanding when he said:

> ". . . they (supervisors under the Wagner Act as construed by the NLRB) are denied, under this provision . . . the protection to which I have adverted.

> "That does not mean that they do not have the right of bargaining together with the employer, provided he recognizes them or *provided they may enforce that kind of cooperation,* but it does mean that they do not have the right, which they have today, to become a collective-bargaining group under the National Labor Relations Act." Id. at 1167 (emphasis added).

It was this uniform understanding of the impact of the provisions of the various bills, particularly of § 14(a), that was also reflected in the discussions cited below.[4]

The only other Federal Court to have had occasion to look at the issue, construed it exactly as did the New York Court of Appeals below. In *A. H. Bull Steamship Co.* v. *National Marine Engineers Beneficial Association,* 250 F. 2d 332 (2d Cir. 1957), cert. denied 355 U.S. 932, the Second Circuit said, per Chief Judge Clark:

> "The legislative history of Section 14(a) makes it quite clear that Congress intended the quoted clause *to describe statutes which require employers to bargain collectively or be guilty of an unfair labor practice or its state law equivalent."* 250 F. 2d 332, 339. (Emphasis added.)

Thus, on the threshold issue posed in the petition—namely whether "any law . . . relating to collective bargaining" means what it says—the Second Circuit's view, like this Court's view in *Hanna,* adds up to a rejection of petitioner's torture of the plain statutory language.

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[4] 1 Leg. Hist. 308 (House Report on H.R. 3020—embodying same provisions as §§ 2(3) and 14(a)); 331; 434 "it is contrary to national policy for other Federal or State agencies to compel employers who are subject to the National Board to treat supervisors as employees for the purpose of collective bargaining or organization activity"; 501 "The normal effect of such exclusion will be to force such employees to seek redress in self-help."; 613 Rep. Hartley—"they (supervisors) cannot obtain the benefits of this act"; 2 Leg. Hist. 1064; 1523; 1576; 1586.

The decisions in both *Hanna* and *Bull*, the only two decisions containing any direct reference to the issues here, construe the Act in terms of its plain and simple meaning. It was upon the authority of these two cases that the Court below properly rested its opinion.[5]

No Court reads Section 14(a) to have the scope proposed in the petition.[6]

No commentator has construed § 14(a) as having such sweep; on the contrary, all the commentary is the other way. Writing just after the Act was passed, Professor Archibald Cox, speaking of Sections 14(a) and 2(3) said:

> "The most important limitation makes it plain that the Act does not apply to foremen or other supervisors, thereby reversing a series of decisions in

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[5] The Court held: "Section 14(a) of the Labor Management Relations Act prevents supervisors' unions from claiming the benefit of statutes requiring employers to bargain collectively but does not limit their right to engage in otherwise lawful picketing (A. H. Bull Steamship Co. v. National Marine Eng. B. Ass'n, 250 F. 2d 332, 339, cert. den. 355 U.S. 932, see Hanna Mining v. Marine Engineers, 382 U.S. 181, 189)." App. D. Petition for Writ of Certiorari, p. 13a.

[6] All the federal cases that have had occasion to pass comment on the problem are in accord with the view in this brief: e.g. *Local 1055, International Bhd. of Electrical Workers, AFL-CIO* v. *Gulf Power Co.*, 175 F. Supp. 315 (N.D. Fla. 1959) (holding that a company must arbitrate its refusal to bargain with a supervisors' union and that a contract with foremen was enforceable, and legal, over the company's argument that since it could not be compelled to bargain by state law the contract to bargain was unenforceable); *Sakrete of Northern California, Inc.* v. *National Labor Relations Board*, 332 F. 2d 902 (9th Cir. 1964) (holding that it is not an unfair labor practice, or an unlawful act, for the union to demand coverage of supervisors under a collective bargaining agreement). See also: *National Labor Relations Board* v. *Budd Mfg. Co.*, 169 F. 2d 571 (6th Cir. 1948) ("There is nothing in the amended Act which restricts freedom of speech on the part of supervisory employees. . . . The amended Act merely changes the statutory method of enforcing those rights." Id. at 577).

> which the Board held, not only that the original Act guaranteed foremen the right to organize and bargaining collectively, but also that they were authorized to bargain . . . through the very unions which represented their subordinates. *The Taft-Hartley changes, while they do not outlaw foremen's unions, leave both foremen and employees to their economic weapons—the foremen to strikes and picketing to compel recognition,* the latter to discriminatory charges, espionage and blacklists to combat efforts to organize." Cox, The Labor-Management Relations Act, 62 Harv. L. Rev. 1, pp. 4-5 (1947). (Emphasis added.)

In short, the amendments left supervisors to just those remedies petitioners, in the name of this very same federal law, want taken away from them.

Professor Smith, of Michigan, writing on the preemption issue, posed by the then new Taft-Hartley Amendments, discussed their limited reach:

> "Section 14(a) of the Amended NLRA operates, on the other hand (comparing it with Section 14(b) which expressly gives the right to regulate union security to the States) as an absolute limitation on the authority of the states to require employers subject to the act to accord bargaining rights to supervisory employees . . .
>
> "By this provision Congress not only repudiated *for federal* purposes the old National Labor Relations Board's doctrine of the *Packard* case but also established a uniform national policy with respect to the bargaining rights of supervisory employees of employers whose activities affect interstate commerce." Smith, *The Taft-Hartley Act and State Jurisdiction Over Labor Relations,* 46 Mich. L. Rev. 593, 599-600 (1948).

What was this "uniform national policy"?

Was it, as petitioners argue that employers may not be compelled *by any means whatever,* including economic action, striking and picketing, to recognize and bargain with

a majority supervisors' union? Obviously not. None of the legislative history, not a word in it, would support such a view. Quite the contrary. As Professor Smith put it, consistent with all the legislative history, the pre-Wagner situation was restored:

> "The result is that this collective bargaining position of such employees is to be determined by the parties themselves, not by law. This restores the situation to the status quo ante the original NLRA." Id. at 600.

The purpose of the amendments was to withdraw the protection of the federal act from supervisor-employee organizational activity. *State* law is mentioned, but only because Congress wanted it perfectly clear that no state agency could do what the National Board could not do, 1 Leg. Hist. at 411; also at 331.

If this view of Section 14(a) is correct then there is no need to reach the other arguments advanced in the petition. Section 14(a) is not preemptive—that is precisely what this Court held in *Hanna*; it neither occupies the field to prevent State courts from enjoining supervisor economic activity (as *Hanna* held), nor does it require that they do so as petitioners urge here. All §14(a) does is prevent the States from requiring, under a State Labor Relations Law-type act, that employers otherwise regulated by the LMRA bargain with supervisors or their unions. However it does not prevent such bargaining, nor does it require that a State Court enjoin such activity despite that state's policy to the contrary.[7] That is the clear holding of this court in *Hanna,*

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[7] Petitioners attempt an argument (Point II) that builds on their view of § 14(a), namely that if § 14(a) bars the subject picketing, it is not only preemptive, but it *requires* state courts to enjoin such conduct, despite any state anti-injunction statutes such as NY Labor Law, § 807. (Point II of petition). The argument falls with the misreading of § 14(a). But even if it did not there is no authority anywhere for the proposition that Congress meant to override Norris-LaGuardia or its state counterparts. In meeting

supra, and it is the only fair conclusion from the language of the Act itself, the legislative history and the academic commentary.

Conclusion

Not a single state or federal court in 21 years has come to the conclusion advanced by the petitioner. If adopted petitioners' position would eviscerate the collective bargaining relationships enjoyed by thousands of supervisory employees in many industries. It would destroy these supervisors' hard-won gains when Congress neither wrote such a result, nor intended it, and when every authority that has had occasion to view the problem has rejected that approach. There is no merit whatever in the petitioner's argument nor is there any justification in law or the situation involved in this case for this Court to grant the petition.

Respectfully submitted,

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the identical contention in the *Bull* case, *supra*, Chief Judge Clark wrote:

> "And no mention is made in the statute, the reports or the Congressional debate indicating that the Norris-LaGuardia Act was henceforth to be inapplicable to peaceful strikes by supervisory personnel. Moreover contrary to Bull's contentions, denying the injunction on the basis of the Norris-LaGuardia Act does not compel Bull to bargain collectively with its supervisors in contradiction to the purpose of Section 14(a). Bull can refuse to bargain, discharge the supervisors, and be guilty of no unfair labor practice or conduct proscribed by any other law, either national or local relating to collective bargaining." 250 F. 2d at 339.

APPENDIX A

NEW YORK SHIPPING ASSOCIATION, INC.,
Petitioners,

v.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION (AFL-CIO), et al.,
Respondents.

Memorandum of Mr. Justice Harlan

While I am not prepared to say that the underlying issue in this case will not be deemed worthy of review by this Court, and am inclined to think that I have power to grant the requested stay, I am nonetheless constrained to deny this application. In my opinion, petitioners have failed to make such a showing of probable success on the merits as would justify the award of interim relief. Cf. *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 164. In addition I find little force in the argument that denial of a stay would moot the basic issue, and petitioners' delay in making this application leaves me unpersuaded that the balance of equities on this application favors them.

Application denied.

August 19, 1968.